SHARIAH FRAMEWORK OF TAKAFUL

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Sources of Shariah

Islamic insurance as the name implies, is insurance that is "Islamic" i.e. it conforms to Islamic law (*shariah*). Insurance that conforms to *shariah* or *shariah* compliant must necessarily follow the sources of *shariah*. The four fundamental sources of *shariah* are the *Quran, Sunnah* (traditions of the Prophet Muhammad), *Ijma*^{c} (consensus) and *Qiyas* (analogy) respectively. In other words should there be a problem, one must look to the *Quran* first for the solution. If there exists a rule, then it is taken. If not, one then searches the *Sunnah*. Both the *Quran* and the *Sunnah* are divinely inspired. If no ruling is found in the *Quran* or the *Sunnah*, the *ijma*^{c} of the *imam mujtahids* (those who do *ijtihad*) is referred to. If there is none, then one does *ijtihad* (independent judgement) to come up with a ruling based on qiyas (individual reasoning based on analogy). However, it should be noted that qiyas must meet the following conditions :

1. That it must be resorted only in the absence of the applicable text of the shariah
2. That in no way should it contravene the shariah and
3. That the course of reasoning should not become entangled in any kind of sophistry or complication of expression which might affect the people's direct attachment to the shariah or distort its brilliant clarity.

The basis for using the four sources is the Quranic verse, "O you who believe! Obey Allah and obey the Prophet (Muhammad SAW), and those of you (Muslims) who are in authority *(ulil amri).* (And) if you differ in anything amongst yourselves, refer it to Allah and His Prophet (SAW), if you believe in

Allâh and in the Last Day. That is better and more suitable for final determination." 4:59

The order to obey God and the Prophet means to follow the Quran and the Sunnah and the order to obey the *ulil amri* means to follow the *ijma*^{c} of the *imam mujtahids* since they are the *ulil amri* in developing the Islamic *shariah*. The order to refer differences relating to *shariah* back to God and the Prophet means using *qiyas* if there is no evidence from the *Quran, Sunnah* or *ijma*^{c}.

The basis of using the four sources in its chronological order is based on the *hadith* (report on the *Sunnah*) when a companion of the Prophet Muhammad by the name of Mu^{c}adz Bin Jabal who was sent to Yemen, wherein the Prophet asked, "How are you going to decide when asked to make a decision on a matter?". Mu^{c}adz answered, "I will decide according to the Book of God (i.e. the *Quran*)." The Prophet asked, "If you cannot find in the book of God?" Mu^{c}adz answered, "With the *Sunnah* of the Prophet." The Prophet then asked, "If you cannot find it in the Sunnah of the Prophet?" Mu^{c}adz answered, "I will exert myself (*ijtihad*) and decide." Then the Prophet strike Mu^{c}adz's chest and said, "Praise be to God who gives guidance to the messenger of the Prophet of God."

Secondary Sources of Shariah

Apart from the four sources of shariah that have been agreed upon by scholars, there are other sources of shariah. However, scholars are in disagreement as to whether these can be used as sources of shariah. Some of the more common among them are :

1. *Istihsan* (juristic preference)
2. *Maslahah Mursalah* (public interest)
3. *Istishab* (original legal position)
4. ^{c}*Uruf* (custom)

5. *Mazhab Sahabi* (following the companions of the Prophet)
6. *Shar*^{c}*un Man Qablana* (shariah of those before us)

There are therefore ten common sources of shariah of which four have been agreed to by the scholars and another six have not been agreed to by the scholars. In this chapter, we are only interested in the four sources of shariah which have been agreed to by the scholars.

The *Quran*

The *Quran* is defined as the word of God revealed to the Prophet in the Arabic language as His argumentation. The *Quran* says, "Your companion (Muhammad SAW) has neither gone astray nor has erred. Nor does he speak of (his own) desire. It is only a divine revelation revealed unto him." (53:2-4)

The *Quran* is revealed in stages through the angel Gabriel during the Prophet's mission which lasted for about twenty three years. The *Quran* says, "And (it is) a *Quran* which We have divided (into parts), in order that you might recite it to men at intervals. And We have revealed it in stages."

The verses of the *Quran* which was sent down in Makkah during the first part of the Prophethood mainly centers around Oneness of God, belief and faith in the angels, the prophets and the last day. In the Makkan verses also, there are contentions against the nonbelievers, parables, explanations on consequences of ascribing partners to God, independent thought and escaping from what have been practiced by the ancestors.

The verses that have been sent down during the Prophethood in Madinah contains rules and laws, conduct of state, conduct of family life and relations among Muslims and between Muslims and non Muslims.

Authority of the Quran

Muslims believe that the *Quran* is the Word of God and an everlasting

miracle. The *Quran* has forwarded many challenges to mankind. Even during the Prophet’s time the Meccans rejected the Prophet saying that the Quran is not the Word of God. For this, the *Quran* challenged them saying that if it not the Word of God, then they would be able to produce a similar composition. In fact the *Quran* not only challenged them once, but thrice. In the first challenge the *Quran* says,

> "Or they say, "He (the Prophet) forged it (the *Qur'an*)." Say: "Bring you then ten forged *Sûrah* (chapters) like unto it, and call whomsoever you can, other than God (to your help), if you speak the truth!" (11:13)

In the second challenge the Quran says,

> "And if you are in doubt concerning that which We have sent down (i.e. the *Quran*) to Our slave (the Prophet), then produce a *Surah* (chapter) of the like thereof and call your witnesses (supporters and helpers) besides God if you are truthful. But if you do it not, and you can never do it, then fear the Fire whose fuel is men and stones, prepared for the unbelievers." (2:23-24)

In the final challenge, the Quran says,

"Do they say He (Muhammad SAW) has forged it (this Quran). Nay! They believe not! Let them then produce an utterence like unto it (the Quran) if they are truthful." (52:33-34)

Like all Arabs the Meccans were the connoisseurs of language and rhetoric and were master orators and excellent poets as well but they did not respond to the challenges as it is obvious that they could not. The Prophet had also said, "Indeed I am the Prophet of God. As a proof that I am a Prophet of God is the *Quran* that I will recite to you as inspiration (wahyu) from God." When they rejected him, the Prophet said, "If you doubt that the *Quran* is from God and according to your opinion the *Quran* is a product of man, then produce a likeness of it; or ten verses like it or a verse like it."

The *Quran* also confirms that even if the whole of mankind were to get together, they would not be able to produce anything similar to the Quran as proven by the following verses:

> "Do they not consider the *Quran*? Had it been from any other than *Allah*, they would surely have found therein much discrepancy." 4 :82
>
> "Say (to them, O Muhammad SAW): "Then bring a Book from Allâh, which is a better guide than these two [the *Taurat* (Torah) and the *Quran*], that I may follow it, if you are truthful." But if they answer you not then know that they only follow their own lusts. And who is more astray than one who follows his own lusts, without guidance from Allah? Verily! Allah guides not the people who are unjust (28:49-50)"
>
> "Say: "If mankind and the jinns were together to produce the like of this Quran, they could not produce the like thereof, even if they helped one another." "(17:88)

Every word of the *Quran* has been transmitted to us in a recurrent (t*awatur) manner. A mutawatir (from the word tawatur) report* means that the report reaches us through a chain of so many people that it is impossible for all of them to concoct a lie. This means that the Quran is decisive in its certainty (*qat^{c}i al thubut*). The Quran is written between the two covers of the Holy Book beginning with *Surat al Fatihah* (The Opening Chapter) and ending with the *Surat al Nas*.

The Sunnah

The Sunnah is defined as the saying (*qaulan*), action (*fi^{c}lan*) and agreement (*taqrir*) of the Prophet. The saying of the Prophet, "Pray as you see me pray." constitute a *Sunnah qauliyah* (verbal *Sunnah*). The way the Prophet prays constitute a *Sunnah fi^{c}liyah* (practical *Sunnah* or *Sunnah* by action). Sometimes, the Prophet did not say or do something but sanctioned (or did not prohibit as the case may be) the saying or action of a companion or several of his companions. This constitutes a *Sunnah taqririyah* (*Sunnah* by

agreement). For example, after the azan before the dusk (*Maghrib*) prayer some companions pray two *rakaats* before the obligatory prayer. The Prophet himself did not pray but did not stop the companions from praying. This constitutes *Sunnah taqririyah*

Authority of the Sunnah

The Sunnah derives its authority from the Quran itself. There are many verses regarding this. Some of the verses of the Quran which authorises the Sunnah are as follows :

> "He who obeys the Prophet (Muhammad SAW), has indeed obeyed Allâh, but he who turns away, then we have not sent you (O Muhammad SAW) as a watcher over them."4:80
>
> "It is not for a believer, man or woman, when Allah and His Prophet have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Prophet, he has indeed strayed in a plain error." 33:36

The above verses mention in no uncertain terms that obedience to the Prophet means obedience to God. Furthermore, there are many other verses of the Quran informing us of the functions of the Prophet as the interpreter of the Quran. Among these are:

> "With clear signs and Books (We sent the Prophets). And We have also sent down unto you (O Muhammad SAW) the reminder and the advice (the Qur'ân), that you may explain clearly to men what is sent down to them, and that they may give thought."16:44
>
> "Those who follow the Prophet, the Prophet who can neither read nor write whom they find written with them in the *Taurat* (Torah) and the *Injil* (Gospel). He commands them to do good deeds (*Al-Ma'rûf)* and forbids them from evil (*Al-*

> *Munkar,)* he allows them as lawful the good things (*At-Taiyibat)* and prohibits them as unlawful the bad (*Al-Khaba'ith,)* he releases them from their heavy burdens (of Allah's Covenant), and from the fetters (bindings) that were upon them. So those who believe in him (Muhammad SAW), honour him, help him, and follow the light (the Quran) which has been sent down with him, it is they who will be successful. Say (O Muhammad SAW): "O mankind! Indeed, I am sent to you all as the Prophet of Allah - to Whom belongs the dominion of the heavens and the earth. *La ilaha illa Huwa* (none has the right to be worshipped but He); It is He Who gives life and causes death. So believe in Allah and His Prophet (Muhammad SAW), the Prophet who can neither read nor write who believes in Allah and His Words and follow him so that you may be guided." 7:157-158

> "And whatsoever the Prophet (Muhammad SAW) gives you, take it, and whatsoever he forbids you, abstain (from it), and fear Allah. Verily, Allah is Severe in punishment." 59:7

> "Indeed in the Prophet of Allah (Muhammad SAW) you have a good example to follow for him who hopes in (the Meeting with) Allah and the Last Day and remembers Allah much." 33:21

> "Nor does he speak of (his own) desire. It is only an Revelation inspired."53:3-4

Books of Sunnah

The *Sunnah* can be found in the books of *Ahadith* (plural for *Hadith*). The are two types of *Hadith*; *mutawatir* (recurrent) and *ahad* (unit). A *mutawatir Hadith* is a *Hadith* that is *qat*^{c}*i al thubut* (decisive in its certainty). There is no doubt

that it actually came from the Prophet as it is impossible for all of narrators to concoct a lie. This is so because :

1. The number of narrators in each chain is so many that it is impossible for all of them to concoct a lie.
2. They are known to be honest.
3. They are from different places.

Scholars differ as to the minimum number of narrators required in each in order for the hadith to be classified as *mutawatir*; some say that it should be equivalent to the number of people who participated in the battle of badr but other scholars put the number as low as four.

An *ahad* Hadith does not reach the status of *mutawatir*. In general the *ahad Hadith* is classified into three categories; *Sahih* (Excellent)*, Hasan* (Good) and *Dhaif* (Weak)*.* The Sahih hadith and to a certain extent the hasan hadith can be used as a source of Islamic law but the dhaif hadith cannot be used as a basis since it contains doubts and uncertainties.

Professor Mustafa Azami has listed five criteria in order for a hadith to be sahih. These are :

1. Continuity of the chain of transmitters (*ittisal assanad*)

   The chain of transmitters must be unbroken i.e. none of the transmitters must be missing from the chain of transmitters. Furthermore each transmitter must also have heard the hadith in question directly from the transmitter before him. Knowledge of this is verified with help of the biographical sciences of the ᶜ*ulumul hadith*. (science of hadith).

2. The integrity (ᶜ*adalah*) of the transmitters

   The integrity of the transmitters is established in terms of their outward observance of islam. In other words it is ascertained that they practice what is required of them by Islam and that they are not known to

engage in doing things which are forbidden. Again this is verified through the biographical sciences of hadith.

3. Soundness of memory of the transmitters

   It must be verified through the biographical sciences of hadith that each transmitter has a sound memory or that his books were accurate and that he only transmitted directly from his books.

4. Conformity of the hadith

   The hadith must conform with other hadiths which are stronger than it.This conformity must be both in the chain and text.

5. The absence of defects (^{c}illah) in the hadith

A defect in hadith is defined as a hidden defect where on the surface it would to have no defect but an investigation would reveal one.

In order for a hadith to be hasan, it must also satisfy the above criteria except for the third criteria which it needs to satisfy only slightly. Some of the famous books of Hadith are Muwatta^{c} of Imam Malik, Musnad of Imam Ahmad, Sahih al Bukhari and Sahih Muslim.

Ijma^{c}

Ijma^{c} is defined as the consensus of opinion of the *imam mujtahids* among Muslims in a particular time after the death of the Prophet of God regarding the legal position of a matter or problem. The scholars agree that *ijma^{c}* can be used as an argumentation to determine the the legal position of a matter but they disagree as to whom are the *imam mujtahids* who can determine the *ijma^{c}.* An example of an ijma^{c} is the ruling on lard. There is no injunction in the *Quran* or the *Sunnah* stating that lard is *haram*. What is stated in the *Quran* is that pork is *haram* (Quran 5 : 3) but not lard. However, by *ijma^{c}* lard is *haram.*

Authority of *ijma*^{c}

Earlier we have seen the Quranic verses that ordered the Muslims to obey the *ulil amri* apart from God and the Prophet. As was mentioned, *ulil amri* means those in authority. Those in authority in worldly matters are kings, leaders, etc and those in authority in religious matters are the scholars i.e. the *mujtahids* etc. Ibnu Abbas, a companion of the Prophet interpreted *ulil amri* to mean scholars while some mufassirin (interpreters) interpreted it to be the authorities. Whatever the differences, the general import of the word includes scholars. Therefore if the mujtahids have agreed on a ruling, it must be followed. This is based on the Quran,

> "... If only they had referred it to the Prophet or the ulil amri among them, the proper investigators would have understood it from them (i.e. the Prophet and the ulil amri) directly." (4:83)

The are also many hadiths to confirm the authority of *ijma*^{c}*.* Some of the hadiths are as follows :

1. "Whatever is good in the eyes of the Muslims is also good in the eyes of God."
2. "My community will not agree on an error."
3. "Remember whoever wants to be in heaven, must follow the group because the Devil is with the loner. He is farther from two people than a loner."
4. "God will not gather my community in *dalalah*."

Conditions for *ijma*^{c}

In order for *ijma*^{c} to be valid, it must meet three conditions. They are :

1. The *ijma*^{c} is irrespective of country, nationality or group. Therefore if there is *ijma*^{c} among the *mujtahids* from Makkah, Madinah, Iraq, Hijaz, the Prophet's family or Ahl Sunnah only, then it cannot be considered as *ijma*^{c} among the mujtahids.

2. The *ijma*^{c} among the *mujtahids* is clearly manifested either through their speech or action, either individually or in a group.

3. The *ijma*^{c} must include all *mujtahids*. If the majority of *mujtahids* agree but there is still a minority of *mujtahids* who disagree, then it cannot be considered *ijma*^{c} and cannot be used as an argumantation decisively.

Qiyas

Qiyas means to equate the legal position of a matter that has no ruling from the *Quran* and the *Sunnah* to one that has due to the ^{c}*illat* (underlying cause or reason) of the ruling. In other words, the mujtahids refer back to the Quran and the Sunnah and make an analogical reasoning between a new matter that has no ruling with the one that already has a ruling.

Authority of *Qiyas*

Qiyas derives its authority both from the Quran and the Sunnah. Earlier, we saw that the basis for using the four sources is the following Quranic verse, "O you who believe! Obey Allah and obey the Prophet (Muhammad SAW), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Prophet (SAW), if you believe in Allâh and in the Last Day. That is better and more suitable for final determination." 4:59

Allah swt ordered the Muslims to refer or revert back to God (through His book, the Quran) and His Prophet (through the Sunnah) if there are differences of opinion. This means using analogical reasoning based on the Quran and the Sunnah in coming up with a ruling on a new matter.

Furthermore in the Quran God says, "And take it as an example. "(59 : 2).

This means to compare and make an analogy between yourselves and themselves as you are also humans like them.

In the sunnah too there are numerous examples of qias. Apart from the hadith of Mua^{c}dz above, the Prophet was once asked by Jariyah Khasmiyah, "O Prophet of Allah, My father is commanded to perform the haj when he is already old or when he is not able to do so. If I perform on his behalf, is it beneficial to him?" The Prophet answered, "What do you think if your father owes a debt and you pay on his behalf, is that beneficial?". Jariyah answered, "Yes." This shows that the Prophet (SAW) used analogy between performing the haj and the paying of a debt.

Tenets of *Qiyas*

The tenets of *qiyas* are four. They are :

1. *Al-Asl* (The Source) : The original matter (or source) that has a ruling in the Quran or the Sunnah where the analogy can be referred to.
2. *Al Far^{c}u* (The Branch) : The matter (or target) that needs the ruling.
3. *Hukum Asl* : The ruling (legal position) of the source.
4. *Al ^{c}Illah* (underlying cause or reason): The characteristic that is inherent in the source where, because of it, the source attains its legal position; and since the characteristic is also inherent in the target, it legal position is the same as that of the source.

For example the Quran prohibited the drinking of *khamar*. The prohibition is due to the intoxicating nature of khamar which is the ^{c}*illah* or the underlying reason for the prohibition. Then beer (the target) which is made from barley is also prohibited since it also intoxicates.

Conditions for ijtihad

It should be noted that before one can do *ijtihad* one needs to fulfil the following conditions :

1. Master the arabic language
2. Well versed in the *asbabun nuzul* (reasons for revelation) of the Quran
3. Well versed in the *nasakh wa mansukh* (abrogating and abrogated) verses in the *Quran*
4. Well versed in the knowledge of *Sunnah*
5. Understand the position of *ijma*^{c} and *khilaf* (differences of opinion)
6. Well versed in the techniques of *qiyas*
7. Understand the objectives of the *shariah*
8. Just and fear of God

Therefore not everyone can be a mujtahid. In this modern world, it is difficult to find persons that match all the above criteria. In addition, the scholars are expected to comprehend the subject at hand (in this case the subject is insurance) before he or she is able to come up with a ruling.

Legal maxims

Apart from the sources of shariah, *qawaid fiqhiyah* (legal maxims) are also used in the discussion of Takaful.

Some of the more common legal maxims that has been used in the discussion on Takaful are:

1. The original legal position of any matter is permissibility until there is evidence prohibiting it.
2. Whatever leads to haram, is in itself haram.

3. The *yaqin* (certainty) cannot be nullified by *shak* (doubt.)

4. Difficulty brings ease.

5. The ends does not justify the means.